SERVED: March 19, 1993

NTSB Order No. EA-3847

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of March, 1993

Petition of ALBERT W. RUHMANN for review of the denial by the Administrator of the Federal Aviation Administration of the issuance of an airman medical certificate.	Docket SM-3847

ORDER ON RECONSIDERATION

Petitioner seeks reconsideration of our decision, NTSB Order EA-3710, served November 3, 1992. The Administrator has replied in opposition to the petition, and also requests that we modify our decision in three minor respects.[1] In our order, we affirmed the Administrator's denial of a first class medical certificate, concluding that petitioner (formerly an airline transport pilot for a scheduled, Part 121 carrier) had failed to prove by a preponderance of the evidence that he was qualified to hold that certificate. We reversed an initial decision holding to the contrary. We will deny the petition for reconsideration, as it is based on a mischaracterization, purposeful or not, of our decision. We grant the petition for modification.

Petitioner claims that, if our decision stands, "the role of the law judge . . . will be meaningless" and that this case "will make it impossible for any petitioner to prevail in any future medical certification case." Petition at 1. Petitioner bases his allegations on one, summary sentence at the end of our

[1]Petitioner did not reply to the petition for modification.

opinion, ignoring 14 pages of discussion and analysis.

This exaggerated, superficial petition merits little response. The Board may, and has often, revised a law judge's findings of fact to comport with the evidence of record. See, e.g., Administrator v. Wolf, NTSB Order EA-3450 (1991) (Board may reverse the initial decision and affirm the Administrator's order on concluding that the law judge's factual findings cannot be reconciled with the evidence). The medical issues before us in this case, as we decided it (see slip op. at 11), raised no question of witness credibility for which deference to the law judge is typically appropriate. Instead, we were equally able to weigh the conflicting and complex medical evidence.[2]

Nor did we create a new standard that will prevent airmen from prevailing in medical certification cases. We simply found that, in this case, the medical evidence did not permit the law judge's finding that petitioner met his burden of proof. Applying the principles of Administrator v. Loomis, 2 NTSB 1293, 1294 (1975), aff'd sub nom. Loomis v. McLucas, 553 F.2d 634 (10th Cir. 1977), we reviewed the expert medical testimony and opinion. We will not repeat here the detailed analysis we conducted in our prior decision. Suffice it to say that our analysis left sufficient question that we could not find petitioner had met his burden of proving he was qualified. This is a case about brain function, the aftereffects of neurosurgery, and seizure risk. Our analysis may not be transferred wholesale to, and need not set precedent for, other medical cases, where other facts and circumstances prevail.

Turning to the Administrator's request for modification, we agree that the three matters he identifies were inadvertent errors or ambiguous statements that merit correction or clarification. The Administrator is correct that we inadvertently referred to the wrong doctor at one point, and used the wrong year at another. We modify our opinion: (1) on page 13, penultimate line, by changing "Frank" to "Roth"; and (2) in footnote 19, by changing "1986" to "1987."

The Administrator's other concern relates to the intent of the second sentence of the second paragraph on page 13. The Administrator is correct that we did not mean to imply that Drs. Dagi, Shafey, and Burns reviewed the 1989 MRI. Therefore, we will revise the paragraph, and elaborate somewhat, to ensure our analysis on this point is complete and clear. The revised paragraph will read:

[2]Indeed, our ability to do so was likely greater than that of the law judge, who issued his decision at the close of the hearing, with little opportunity for the thorough review and reflection we have given the record.

> Our review of the record convinces us that petitioner has not done so. Dr. Dagi's reading of a 1989 MRI, a reading that is unrebutted in the record, indicates the potential for new abnormality and in other aspects, as well, disagrees with Dr. Burns' conclusions. At least one other doctor (Dr. Shafey) would appear to agree with Dr. Dagi. Thus, there is insufficient basis to accept the law judge's conclusion that Dr. Dagi's MRI reading merely reflected the normal and relatively harmless tissue growth Dr. Burns expected. Dr. Burns offered only one of several possible explanations, and it seriously conflicted with the expert opinions of Drs. Dagi and Shafey.[21]

Finally, the Administrator has also filed two motions related to a letter-writing campaign solicited by petitioner's counsel, Mark McDermott. We have received a number of letters -- all substantially similar, and with many modeled after a letter Mr. McDermott apparently sent to attorneys practicing before us, none of whom are (or represent) parties to this proceeding.[3] The Administrator requests that we disregard these letters as improper ex parte communications.

The FAA petitions and the activities that gave rise to FAA's objections call into issue two equally important, but sometimes conflicting, objectives, to wit, an open and we hope fruitful dialogue between this agency and members of the aviation community on the impact of our enforcement decisions, on the one hand, and, on the other, the need to protect the integrity of our processes against the possibility that decisions may become based upon off-the-record considerations. We have no doubt that counsel's sincere, though seriously misguided, assessment of the Board's November decision caused him to become alarmed. And we are willing to give him the benefit of the doubt by assuming that

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[3]Mr. McDermott's letter stated as its purpose to bring to the reader's attention "an outrageous decision issued by the NTSB which appears to have ominous consequences for any future pilot who wishes to litigate his qualifications for airman medical certification before the NTSB." The letter goes on to offer various substantive disagreements with the Board's opinion. The letter was accompanied by a memo that states: "The attached letter describes an NTSB decision in a case I am handling. The precedent is something none of you can live with. I plan to petition for reconsideration and my petition is due December 3, 1992. I am asking each of you to immediately write to the NTSB to express your concern."

Those correspondents who answered Mr. McDermott's call reiterated his characterizations of and opposition to our analysis, and urged reconsideration of our order.

it was this alarm, rather than an effort to augment his chances for successful re-litigation, that gave rise to his instigating a letter writing campaign. But it is just as obvious that the result was a series of letters that went to the merits of a proceeding, that were filed by non-parties without request or permission for leave to intervene,[4] almost all of which were not made available to the FAA by counsel or correspondents. Obviously it would have been better for counsel to have stayed his hand until the reconsideration petition had been decided. Just as obviously, it would have behooved the various correspondents to have (1) fully informed themselves on the merits[5] and procedural status of the case at issue and (2) given consideration to the requirements imposed upon them by our rules of practice before offering comment.

What is finally most distressing is that, after the fact, with the consequences of his memo/letter-writing campaign apparent, counsel takes the position that there were no rules violated, because the communications were clearly intended to be part of the public record. Passing over the fact that counsel clearly did not intend his part in soliciting these comments to become part of the public record, there is still the inescapable fact that Mr. McDermott did not trouble himself to advise those whose aid he solicited to file their letters in the docketed proceeding and copy the Federal Aviation Administration. The not surprising result was that the NTSB Chairman received much of this correspondence as normal mail.

Having given these matters full consideration, we will grant the request of FAA to disregard these communications. Because we do not wish to stifle the willingness of the public to offer

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[4] The Board's ex parte rules proscribe off-the-record commentary only by "interested" persons. Technically then, there is an argument as to whether the correspondence itself may have been proscribed. The rules, however, clearly proscribe conduct by any interested party in knowingly causing an ex parte communication to be made by others. On the other hand, it does appear that all letter writers were put on notice that the matter was not, as a practical matter, administratively final, as Mr. McDermott's circulating memo indicated his intention to file a petition for reconsideration. Hence, a motion for leave to intervene would have been the most prudent manner for correspondents to proceed, particularly since the filing requirements for such a motion would have assured its receipt by all parties.

[5] It seems unlikely that many of the various correspondents actually read the Board's full decision, and apparently none of them took the opportunity to review pertinent parts of the record.

constructive criticism of our decisions and processes, we decline to determine whether the various correspondents knowingly violated our rules, though we admonish all concerned that there are acceptable and unacceptable ways to offer criticism, and that, as this proceeding demonstrates, the use of unacceptable avenues only guarantees that the criticism will not be heard.

As for petitioner's counsel, we believe a prima facie showing of a violation of Rule 821.61(b) has been made. However, because the Board presently has no announced rules or policy governing the imposition of sanction as to counsel, other than to make an adverse determination against counsel's client,[6] we will not in this proceeding do more than strongly admonish petitioner's counsel to adhere both to the letter and spirit of the Board's ex parte rules in the future. The Board intends to issue a notice proposing various amendments to our rules of practice in the near future, and we will include in that rulemaking a proposal to impose sanctions against attorneys directly, so as to insure the existence of a meaningful deterrent against any such future violations.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petition for reconsideration is denied;

2. The petition for modification is granted, as set forth in this opinion; and

3. The motions to disregard ex parte communication and to disregard arguments contained in unauthorized communications are granted.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above order. Member HART did not participate.

[6] Given that this case has already been decided against the interests of counsel's client, there is little of practical consequence that our rules provide by way of sanction in this proceeding.